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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)	Chapter 11
CELSIUS NETWORK LLC, et al., ¹)	Case No. 22-10964 (MG)
)	
Debtors.)	(Jointly Administered)
)	

**NOTICE OF RULING ON DEBTORS' AMENDED
MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE DEBTORS'
KEY EMPLOYEE RETENTION PLAN AND (II) GRANTING RELATED RELIEF**

PLEASE TAKE NOTICE that on November 21, 2022, the Debtors filed the *Debtors' Amended Motion for Entry of an Order Authorizing the Debtors to Redact and File Under Seal Certain Confidential Information Related to the Debtors' Key Employee Retention Plan* (the "Amended Seal Motion") [Docket No. 1425], and on November 22, 2022, the Debtors filed the *Debtors' Amended Motion for Entry of an Order (I) Approving the Debtors' Key Employee Retention Plan and (II) Granting Related Relief* (the "Amended KERP Motion") [Docket No. 1426] and the *Motion to Schedule an Expedited Hearing and Shorten the Notice Period on the Debtors' (A) Amended Motion for Entry of an Order (I) Approving the Debtors' Key Employee Retention Plan and (II) Granting Related Relief and (B) Amended Motion for Entry of*

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Celsius Network LLC (2148); Celsius KeyFi LLC (4414); Celsius Lending LLC (8417); Celsius Mining LLC (1387); Celsius Network Inc. (1219); Celsius Network Limited (8554); Celsius Networks Lending LLC (3390); Celsius US Holding LLC (7956); GK8 Ltd. (1209); GK8 UK Limited (0893); and GK8 USA LLC (9450). The location of Debtor Celsius Network LLC's principal place of business and the Debtors' service address in these chapter 11 cases is 50 Harrison Street, Suite 209F, Hoboken, New Jersey 07030.

an Order Authorizing the Debtors to Redact and File Under Seal Certain Confidential Information Related to the Debtors' Key Employee Retention Plan (the "Motion to Shorten" and along with the Amended Seal Motion and the Amended KERP Motion, the "KERP Motions") [Docket No. 1429].

PLEASE TAKE FURTHER NOTICE that a hearing was held on December 5, 2022, on the KERP Motions (the "Hearing").

PLEASE TAKE FURTHER NOTICE that at the Hearing, the Court approved the relief sought in the KERP Motions and read a ruling into the record.

PLEASE TAKE FURTHER NOTICE that the Court entered the *Order (I) Approving the Debtors' Key Employee Retention Plan and (II) Granting Related Relief* [Docket No. 1683].

PLEASE TAKE FURTHER NOTICE that pursuant to the Court's request that the Debtors file the relevant transcript pages associated with the Court's ruling on the KERP Motions, the Debtors have attached the same hereto as Exhibit A.

[*Remainder of page intentionally left blank*]

New York, New York
Dated: December 20, 2022

/s/ Joshua A. Sussberg

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Exhibit A

Excerpts from *In re Celsius Network LLC et. al.* Hearing Transcript – December 5, 2022

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1 Debtor's key employee retention plan. There were three
2 motions specifically, a motion to shorten notice, a motion
3 to seal, and then an amended motion to approve the KERP.
4 The amended motion was filed at Docket Number 1426, Your
5 Honor, and it supplements and amends an original order filed
6 back on October 11 of this year at Docket Number 1021.

7 Your Honor, I will note that as a gating matter,
8 one of the objections, the Mr. Frishberg objection, as I
9 read it, Your Honor, doesn't relate to the substance of the
10 KERP so much as it does to the timing and the request to
11 expedite. And as he made his appearance, he asked or
12 suggested that maybe the Motion to Expedite be taken up
13 first as a gating matter, which I'm happy to follow Your
14 Honor's preference. I'm certainly happy to make a few
15 remarks on the Motion to Expedite.

16 THE COURT: That's unnecessary because I invited
17 an expedite hearing on the KERP. It was specifically at my
18 urging that that was done. So the motion to shorten time,
19 ECF 1429 is granted.

20 MR. KWASTENIET: Thank you, Your Honor.

21 THE COURT: So let me ask Ms. Cornell with respect
22 to the ceiling motion, do you have an objection to the
23 ceiling motion? The ceiling motion is Number 2 on the
24 agenda. It's ECF 1425. There were no responses that were
25 filed, but I just --

1 MS. CORNELL: Only insofar as the redactions
2 pertained to our objection and the information on the
3 evidentiary record.

4 THE COURT: I don't understand what you just said
5 -- told me. Why don't you go up to the microphone if you
6 would?

7 MS. CORNELL: Good morning, Your Honor. Shara
8 Cornell on behalf of the Office of the United States
9 Trustee. We filed our objection to the KERP ad filed at
10 1426 and the motion to file under CLF 1425 in this case. I
11 don't think I need to repeat what's in the objection, but
12 insofar as the evidentiary basis provided by the Debtors
13 today is insufficient because of those redactions. The
14 United States Trustee objects to the motion to seal.

15 THE COURT: Okay.

16 MS. CORNELL: Thank you.

17 THE COURT: All right. The objection to the
18 motion to seal is overruled. There were -- and so the
19 motion to seal is granted.

20 MS. CORNELL: Thank you, Your Honor.

21 THE COURT: All right. Thank you.

22 MR. KWASTENIET: Thank you, Your Honor. I think
23 that leaves us with two objections to the revised KERP
24 motion. The U.S. Trustee's objection relates primarily to
25 the adequacy of the record that we've made. And Your Honor,

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1 the -- of an order approving the KERP? All right. Not
2 having -- hearing anyone, I'll go ahead and rule from the
3 bench.

4 CLERK: Sorry, Judge. Someone's raising their
5 hands.

6 THE COURT: Okay. I can't see that. So who is
7 raising their hand?

8 CLERK: Mr. De Las Heras.

9 THE COURT: Okay. Go ahead.

10 MR. DE LAS HERAS: I am, Your Honor. May I be
11 very brief today? Thank you. I assume it is --

12 THE COURT: That's fine.

13 MR. DE LAS HERAS: -- fine. An objection with
14 Docket Number 1544. If Debtors are going to address my
15 concern, there is nothing I can say, but I rest in what is
16 in my objection Docket 1544. Thank you.

17 THE COURT: Okay. Thank you very much. Does
18 anybody else wish to be heard? Deanna, I can't see if
19 anybody's raising their hand, so I'll just depend on you to
20 call them out.

21 CLERK: I see no additional raised hands, Judge.

22 THE COURT: All right. So what I'm going to do is
23 read my ruling into the record. I would ask that the Debtor
24 have a transcript of the ruling prepared so that -- what
25 I've been -- tried to be very cautious about in this case is

1 when I rule, I've been trying to rule in written opinions.
2 I want to be sure that there's no misunderstanding about
3 what I have ruled. But here on this motion, I'll go ahead
4 and just read my ruling into the record. A transcript can
5 be prepared, and it will be on ECF -- on the ECF Docket. I
6 suppose it'll be on the claims agent's docket as well and so
7 that people can see precisely what I've ruled.

8 So first, let me deal with the general legal
9 framework for approving KERPs. Section 363(b) of the
10 Bankruptcy Code provides that a Debtor, after notice and a
11 hearing, may use, sell, or lease other than in the ordinary
12 course of business property of the estate. That's Section
13 363(b)(1). To approve the use of estate property under
14 Section 363(b)(1) of the Bankruptcy Code, a Debtor must show
15 that the decision to use the property outside of the
16 ordinary course of business was based on the Debtor's
17 business judgment. See *In re Chateaugay Corp.*, 973 F.2d 141
18 at 143 (2nd Cir. 1992) holding that a judge determining a
19 Section 363(b) application must find a good business reason
20 to grant such application.

21 Section 503 governs the allowance of
22 administrative expenses "for actual necessary costs and
23 expenses of preserving a Debtor's estate". That's Section
24 503(b)(1)(A). The two general overriding policies of
25 Section 503 of the Bankruptcy Code -- excuse me -- are to

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1 preserve the value of the estate for the benefit of its
2 Creditors and to prevent the unjust enrichment of insiders
3 of the estate at the expense of its Creditors. See In re
4 Journal Register Co., 407 B.R. 520 at page 535 (Bankr.
5 S.D.N.Y. 2009). It cites the Second Circuit's McFarland's
6 decision, which is at 789 F.2d 98 at page 101 (2d Cir.
7 1960).

8 So with respect to payments to insiders, Section
9 503(c)(1) prohibits the transfers to insiders unless certain
10 strict requirements are met. A, the transferer obligation
11 is essential to retention of the person because the
12 individual has a bona fide job offer from another business
13 at the same or greater rate of compensation; B, the services
14 provided by the person are essential to the survival of the
15 business; and C, either the amount of the transfer made to
16 or obligation incurred for the benefit of the person is not
17 greater than an amount equal to ten times the amount of the
18 mean transfer or obligation of a similar kind given to non-
19 management employees for any purpose during the calendar
20 year in which the transfer's made or obligation is incurred.

21 Or if no such similar transfers were made to or
22 obligations were incurred for the benefit of such non-
23 management employees during such calendar year, the amount
24 of the transfer or obligation is not greater than an amount
25 equal to 25 percent of the amount of any similar transfer or

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1 obligation made to or incurred for the benefit of such
2 insider for any purpose during the calendar year before the
3 year in which such transfer is made or obligation is
4 incurred. That's Section 503(c)(1).

5 Section 101(31)(B) defines an insider in the
6 context of a corporation as including a director of the
7 corporation, officer of the corporation, person in control
8 of the Debtor, partnership in which the Debtor is a general
9 partner, general partner of the Debtor, or relative of a
10 general partner, director, officer, or person in control of
11 the Debtor.

12 With respect to payments to non-insiders, if an
13 employee is not an insider, Section 503(c)(3) of the
14 Bankruptcy Code permits payments to the Debtor's employees
15 outside the ordinary course of business if such payments are
16 justified by "the facts and circumstances of the case".
17 Importantly, Section 503(c)(3)'s "facts and circumstances"
18 justification test "creates a standard no different than the
19 business judgment standard under Section 363(b) of the
20 Bankruptcy Code." See *In re Velo Holding, Inc.*, 472 B.R.
21 201 at page 209 (Bankr. S.D.N.Y. 2012). That's one of my
22 opinions. See also *Borders Group*, 453 B.R. at pages 473 and
23 74 evaluating the Debtor's KERP under a business judgment
24 rule. That's also one of my opinions.

25 In re Dana Corp., 358 B.R. 567 at 576 and 77

1 (Bankr. S.D.N.Y. 2006) describing six factors that courts
2 may consider when determining whether the structure of a
3 compensation proposal meets the "sound business judgment
4 test" in accordance with Section 503(c)(3) of the Bankruptcy
5 Code.

6 All right. I've already indicated I granted the
7 motion to shorten time, and I granted the ceiling motion. I
8 believe they're entirely appropriate in these circumstances.
9 I invited the shortening of time, and the ceiling seems
10 entirely appropriate consistent with comments I made
11 earlier.

12 All right. So with respect to the KERP, whether
13 the KERP participants are insiders, the question of whether
14 participants are insiders is vital because it determines
15 whether the Debtors will be required to meet the strict
16 standards of Section 503(c)(1) or whether their KERP will be
17 evaluated under the more lenient business judgment standard.
18 Under Section 101(31) of the Bankruptcy Code where a Debtor
19 is a corporation, insiders may include any "(i) director of
20 the Debtor; (ii) officer of the Debtor; (iii) person in
21 control of the Debtor; or (iv) relative of a director,
22 officer, or person in control of the Debtor".

23 Courts have also considered -- I've also concluded
24 that an employee may be an insider if such employee has at
25 least a controlling interest in the Debtor or exercises

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1 sufficient authority over the Debtor so as to unqualifiedly
2 dictate corporate policy and the disposition of corporate
3 assets. See *Velo Holdings*, 472 B.R. at 208. An
4 individual's title by itself is insufficient to establish
5 that an individual is a director or officer. See *In re*
6 *Longview Aluminum, LLC*, 419 B.R. 351 at page 355 (Bankr.
7 N.D. Ill. 2009). There are other cases that reach that same
8 proposition. I won't burden the record further.

9 In *Public Access Technologies*, for example, the
10 court found that an executive vice president was not an
11 officer of the Debtor because there was no evidence such as
12 affidavits, articles of incorporation, corporate minutes,
13 resolutions, or any other document proving that the
14 executive vice president was an officer under Section
15 101(31)(b), 307 B.R. at 506.

16 Here I'm satisfied that the participants are not
17 insiders. In their exhibits, the Debtors have provided
18 detailed information about the participants' duties, salary,
19 and position within the reporting structure. The Debtors
20 have provided a declaration attesting that though some of
21 the employees have titles such as "head", "director", "vice
22 president", or "chief", none of the participants have
23 discretionary control over substantial budgetary amounts or
24 significant control with respect to the Debtor's corporate
25 policies or governance. See the Ferraro declaration,

1 Paragraph 19.

2 Moreover, each of the participants' roles are
3 limited in scope. None made company wide or strategic
4 decisions, and none exercised sufficient authority over the
5 Debtor as to unqualifiedly dictate corporate policy. See
6 the motion in Paragraph 39. It cites In re Global Aviation,
7 478 B.R. at 140 and 150. None of the participants were
8 appointed by the board to sit on the board or directly
9 report to the board. See In re LSC Communications, 631 B.R.
10 818 at page 827 (S.D.N.Y. 2021) finding that the employees
11 who were appointed by the board and would be deemed officers
12 of the Delaware Corporate Law should "weigh heavily in
13 concluding that the employees are officers for bankruptcy
14 code purposes."

15 So whether the KERP should be approved, given that
16 the participants are not insiders, the KERP should be
17 evaluated under Section 503(c)(3) of the Bankruptcy Code to
18 ensure that it is "justified by the facts and circumstances
19 of the case." See In re Borders Group, 453 B.R. at page
20 470. On balance, in described in more detail below with the
21 details of the unredacted information, I am satisfied the
22 Debtors have met their burden of showing that the KERP is
23 justified in a reasonable exercise of their business
24 judgment. So then with respect to whether this KERP is
25 justified by the facts and circumstances of the case,

1 although the Court should be satisfied that the KERP
2 employees are not insiders under Section 101(31), the KERP
3 must still be analyzed under Section 503(c)(3) because it is
4 not an ordinary course transaction. See *In re Nellson*
5 *Nutraceutical, Inc.*, 369 B.R. 787 at pages 803 and 804
6 (Bankr. D. Del. 2007).

7 In the context of approving compensation programs,
8 courts in the Second Circuit have considered the factors
9 identified in *In re Dana Corp.*, which I cited earlier, when
10 determining if a compensation proposal and the process for
11 developing it meet the sound business judgment test. Those
12 issues are, A, is there a reasonable relationship between
13 the plan proposed and the results to be obtained? I.e.,
14 will the key employees stay for as long as it takes for the
15 Debtor to reorganize or market its assets?

16 B, is the cost of the plan reasonable in the
17 context of the Debtor's assets, liabilities, and earning
18 potential? C, is the scope of the plan fair and reasonable?
19 Does it apply to all employees? Or if not, does it
20 discriminate unfairly? And D, is the plan or proposal
21 consistent with industry standards? E, what were the due
22 diligence efforts of the Debtor in investigating the need
23 for a plan analyzing which key employees need to be
24 incentivized? What is available? And what is generally
25 applicable in a particular industry? And F, did the Debtor

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1 receive independent counsel in performing due diligence and
2 in creating and authorizing the incentive compensation. See
3 In re Dana Corp., 358 B.R. at pages 576 and 77.

4 So the relationship between this plan, the plan
5 proposed, and the results obtained. The reasonable
6 relationship exists between the plans proposed and the
7 results to be obtained. See 358 B.R. at 566 and 57. The
8 Debtors have noted that the goal of their KERP is to have
9 appropriate staff on hand to facilitate a reorganization of
10 sale. See the motion at Paragraph 29. The proposed KERP is
11 narrowly tailored to that goal. The Debtors have chosen 59
12 out of 167 employees at the time of this writing -- the time
13 of the writing of the motion, who the Debtors believe have
14 "institutional and technical knowledge crucial to the
15 Debtor's ability to maximize value." See the Ferraro
16 declaration at Paragraph 15.

17 Further, the payments are paid in increments and
18 are tied to the participants remaining at the Debtors for a
19 year, which is aligned the Debtor's goal of keeping the
20 participants on staff through the restructuring and sale
21 process. See the motion at Paragraph 29. The Debtors have
22 also tailored the payment amounts so that the employees that
23 are more critical and more difficult to replace get higher
24 bonuses. See the motion at Paragraph 19. There is already
25 evidence that the employees are strained by the Chapter 11

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1 responsibilities. As the examiner noted in her report that
2 there were delays in the Debtor's production of documents
3 due to the "reduction in Celsius' workforce.". See ECF
4 Docket Number 1411 at page 11.

5 Accordingly, it is evident to the Court that given
6 the pace of attrition here, the Debtors could continue to
7 lose staff at an unsustainable rate if employees are not
8 incentivized to stay. I would note I've had other cases
9 where, as a result of attrition, the Debtors have wound up
10 having to hire more expensive consultants than the employees
11 who are filling those tasks now.

12 All right. Next, the cost of the proposed plans.
13 The cost of the proposed KERP is reasonable in light of the
14 Debtor's financial situation. The cost of the KERP bonuses
15 is approximately \$2.84 million. According to the analysis
16 performed by Gartrell, which compares the Debtor's KERP to
17 26 similarly sized companies, the cost per participant is
18 positioned between the 25th percentile and median of the
19 market. The total cost of the program, approximately 2.84
20 million, is on the higher end between the 75th and 90th
21 percentiles, but the cost as a percentage of assets is on
22 the low end below the 25th percentile.

23 On balance, Gartrell attests that the KERP are
24 "reasonable and appropriate in light of competitive
25 practice." Given that on average the various program

1 metrics fall around the median of the market, I agree with
2 respect to unfair discrimination. The Debtors have also
3 shown that the proposed KERP does not discriminate unfairly.
4 See *In re Eaglepicher Holdings, Inc.*, 2005 W.L. 4030132 at
5 star 4 (Bankr. S.D. Ohio Aug. 26, 2005). In that case, in
6 *Eaglepicher*, the court found that the Debtor's proposed
7 retention plan did not unfairly discriminate against its
8 employees. There the plan only covered "a small minority of
9 employees". However, it was broad enough so that it did not
10 include only senior management.

11 The Court observed that a small group of employees
12 could benefit from the retention plan to the exclusion of
13 others because not every employee is similarly situated in
14 terms of their employment to the reorganization process.
15 Here the Debtors have carefully selected a small pool of
16 employees that are critical in the restructuring process.
17 "The participants are critical to the continued maintenance
18 of customer accounts and that a platform more generally by
19 among other things performing essential security functions
20 and building enhanced features and functionality for the
21 Debtor's system and assets." See the supplemental Ferraro
22 declaration at Paragraph 19.

23 The Debtors have also attested and shown evidence
24 that these employees have been forced to shoulder additional
25 burdens related to the Chapter 11 such that they are

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1 deserving of bonuses. Finally, there is also no evidence in
2 the record that the Debtors have unfairly excluded
3 employees.

4 And then with respect to comportment with industry
5 standards, the proposed KERP comports with industry
6 standards as discussed above. The Debtors have submitted a
7 declaration from a compensation expert that indicates that
8 the terms, cost, and structure of the KERP comport and
9 structure -- comport with the structure of the industry.

10 The propriety of the diligence. The Debtors have
11 exercised proper due diligence in formulating the proposed
12 KERP. In *In re Brooklyn Hospital Center*, 341 B.R. 405 at
13 page 412 (Bankr. E.D.N.Y. 2006), the court found that due
14 care was exhibited by the Debtor in the formulation of a
15 KERP because, among other things, "the board consulted with
16 its counsel and financial advisors, formulated several
17 proposals, reduced the amount to be paid pursuant to the
18 KERP, and after negotiations with the committee, broadened
19 the scope of employees."

20 Here the Debtors engaged and retained WTW to
21 provide independent compensation advice, and the Debtor's
22 special committee undertook a deliberative process convening
23 with the Debtor's various advisors. See the Ferraro
24 declaration at Paragraph 17. The Debtors also conferred
25 with the U.S. Trustee on November 2, 2022 and based on the

1 results of the conversation, the Debtors revised the KERP
2 participant list. And see the amended motion in Paragraph
3 5. Accordingly, I am satisfied that the Debtors have
4 undertaken sufficient diligence.

5 And then with respect to adequacy of counsel, in
6 the last -- lastly, the Debtors' counsel from a highly
7 competent and experienced independent compensation
8 consultant, their counsel and their highly experienced
9 independent consultation with WTW, see our trial declaration
10 at Paragraph 7, together with the input that the Debtors
11 received from other advisors, I'm satisfied that the Debtors
12 received sufficient counsel.

13 For all of those foregoing reasons, the Court
14 grants the amended KERP motion. I understand before an
15 order will be entered you'll go back and review the
16 participant list to satisfy that, at least initially,
17 looking at it that none had withdrawn substantial funds in
18 the 90 days before. They can still be included in that
19 subsequently if that's appropriately.

20 MR. KWASTENIET: That's right, Your Honor. And we
21 expect that'll take a few days --

22 THE COURT: That's fine.

23 MR. KWASTENIET: -- to sort out that analysis.
24 And then once we've concluded that, we'll present the
25 revised form of order to the U.S. Trustee and the committee